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March 14, 2023

VIA CM/ECF

Hon. Joan M. Azrack
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, NY 11722

Re: *The Estate of Genevieve McCaffrey v. Our Lady of Consolation Nursing and Rehabilitative Care Center et al.*
Case No. 2:23-cv-01611-JMA-SIL

Dear Judge Azrack:

The undersigned represents defendant Our Lady of Consolation Nursing and Rehabilitative Care Center ("OLOC") in the above-referenced action. This letter is submitted pursuant to this Court's March 7, 2023, Order directing the parties to show cause why this case should not be remanded to the Supreme Court, Suffolk County, in light of the Second Circuit's decision in *Solomon v. St. Joseph Hosp.*, No. 21-2729, --- F.4th ----, 2023 WL 2376207 (2d Cir. Mar. 7, 2023). (Decision attached).

The *Solomon* court ruled that "the PREP Act's cause of action for willful misconduct is unambiguously 'an exclusive Federal cause of action' that forms the basis for federal jurisdiction." *Solomon, supra*, at 10, *citing* 42 U.S.C. § 247d-6d(d)(1). As to the specific claims in that case, the court held: (1) plaintiff's state-law claims were not completely preempted by the PREP Act because they did not fall within the scope of the PREP Act's federal cause of action for willful misconduct; (2) there was no jurisdiction under the federal-officer removal statute because the hospital defendants therein did not "act under" a federal officer; and (3) plaintiff's claims there did not "arise under" federal law.

By contrast, the Complaint here expressly alleges "an act or omission that is taken -- (i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; and (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit," thereby falling within the scope of the PREP Act's cause of action for willful misconduct. 42 U.S.C. § 247d-6d(c)(1)(A). As such, federal jurisdiction is proper under the doctrine of complete preemption. *Solomon*, *supra* at 8.

Plaintiff affirmatively pleads that OLOC's conduct was "willful and wanton in the face of the COVID-19 outbreak and pandemic" and "in total disregard of the plaintiff's decedent's well-being," "knowing that their conduct would probably result in injury or damage to plaintiff's decedent." (Complaint, ECF No. 1-1, ¶¶ 109, 192, 202). Plaintiff also alleges that OLOC "acted in so reckless a manner and/or failed to act in circumstances where an act was clearly required, so as to indicate complete disregard of the consequences of their actions and/or inactions." The Complaint further alleges that OLOC "intentionally … failed to test Genevieve McCaffrey for COVID-19" and "intentionally … failed [to] screen all residents, including Genevieve McCaffrey, for COVID-19 symptoms." (Complaint, ¶¶ 193, 199).

The Complaint also states that OLOC acted intentionally in this regard in order to achieve a wrongful purpose by alleging that "government programs provided [OLOC] with a guaranteed source of income and a continual flow of residents whose care was paid for by [a] taxpayer funded program," and that "plaintiff-decedent, was the type of resident whose care was paid for by the government and was the type of resident [OLOC] actively sought in order to fill their empty beds, increase their rate of occupancy, and overall revenues." Plaintiff thus claims that OLOC wrongfully put profit over patient care as an alleged "proprietary corporation engaged in the for profit operation of a nursing home, which claimed to 'specialize' in the care of helpless individuals who are chronically infirm." (*Id.* at ¶¶ 52-54) (emphasis added).

Accordingly, this case is distinguishable from *Solomon*. Contrary to the facts in that case, the Complaint here alleges conduct that falls within the scope of the PREP Act's exclusive federal cause of action for willful misconduct. As such, this Court has subject matter jurisdiction under the complete preemption doctrine. *Solomon*, *supra*, at 10.

Accordingly, Defendant respectfully asks this Court to retain jurisdiction.

Sincerely,
/s/ Megan A. Lawless
Megan A. Lawless (ML 3227)

TO: (via CM/ECF)
All Parties of Record